Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-836

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

ALBERT ALEXANDER, M.D.,
Petitioner,

v.

SAM PATTERSON, M.D., and STATE VOLUNTEER MUTUAL INSURANCE COMPANY,
Respondents.

On Petition For a Writ of Certiorari
to The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT STATE VOLUNTEER MUTUAL INSURANCE COMPANY

LEO M. BEARMAN
Attorney of Record for
Respondent State Volunteer
Mutual Insurance Company

BAKER, DONELSON, BEARMAN
& CALDWELL
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

QUESTION PRESENTED FOR REVIEW

Whether a motion for summary judgment was properly granted when the non-moving party with the burden of persuasion offered no proof of conspiracy or damages or of a violation by either of the two alleged conspirators of a federally secured right?

PARTIES TO THE PROCEEDING

Albert Alexander, M.D., Petitioner

Attorney of Record:
Timothy R. Holton
Chambers, Crow, Durham & Holton
200 Jefferson Avenue Suite 750
Memphis, Tennessee 38103
(901) 525-4297

Sam Patterson, M.D., Respondent

Attorney of Record:
John J. Thomason
Thomason, Hendrix, Harvey, Johnson & Mitchell
2900 One Commerce Square
Memphis, Tennessee 38103
(901) 525-8721

State Volunteer Mutual Insurance Company, Respondent

Attorney of Record:
Leo M. Bearman
Baker, Donelson, Bearman & Caldwell
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-2000

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 13

REASONS FOR DENYING THE PETITION 14

1. The unsupported allegations of Petitioner do not establish a genuine issue of material fact as to whether the Respondents conspired to deprive Petitioner of his rights under Section 1985(2) sufficient to withstand a motion for summary judgment; summary judgment was therefore properly granted and affirmed 14

2. The district court properly determined that Section 1985(2) requires a nexus between an alleged conspiracy and the right sought to be vindicated under the statute 18

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Patterson, No. 90-2474-G
(W.D. Tenn. Oct. 16, 1992) . . 6, 15, 19, 21, 23

Alexander v. Patterson,
No. 92-6424 (6th Cir. Aug. 10, 1994)11, 15, 16, 25

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 18

Bank v. DiMarco,
836 F. Supp. 304 (E.D. Pa.),
aff'd, 27 F.3d 556 (1993) 15

Bowers v. Potts,
617 S.W.2d 149 (Tenn. App. 1981) 18

Brawer v. Horowitz,
535 F.2d 830 (3d Cir. 1976) 21

Bretz v. Kelman,
773 F.2d 1026 (9th Cir. 1985) 21

Brown v. Saint Louis Fire Department,
691 F.2d 393 (8th Cir.),
cert. denied, 461 U.S. 908 (1983) 26

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 14, 15

Chahal v. Paine Webber, Inc.,
725 F.2d 20 (2d Cir. 1984) 23

David v. United States,
820 F.2d 1038 (9th Cir. 1987) 23

Griffin v. Breckenridge,
403 U.S. 88 (1971) 22

Kimble v. D.J. McDuffy, Inc.,
648 F.2d 340 (5th Cir. 1981) 22

Koehler v. Cummings,
380 F. Supp. 1294 (W.D. Tenn. 1971) 21

Kush v. Rutledge,
460 U.S. 719 (1983) 19

Mason v. Clark,
920 F.2d 493 (8th Cir. 1990) 26

McKenzie v. Doctor's Hospital of Hollywood, Inc.,
765 F. Supp. 1504 (S.D. Fla. 1991) 15

Miller v. Glen & Helen Aircraft, Inc.,
777 F.2d 496 (9th Cir. 1985) 23

Myatt v. City of Chicago,
816 F. Supp. 1259 (N.D. Ill. 1992) 15

Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.,
775 F. Supp. 1420 (D. Kan. 1991) 15

Pusser v. Gordon,
624 S.W.2d 639 (Tenn. App. 1984) 18

Rylewicz v. Beacon Services, Ltd.,
888 F.2d 1175 (7th Cir. 1989) 21

Sadek v. Nashville Recycling Co.,
751 S.W.2d 428 (Tenn. App. 1988) 18

Sampson v. Village Discount Outlet, Inc.,
832 F. Supp. 1163 (N.D. Ill. 1993) .. 15, 18, 23

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 5

STATUTES:

42 U.S.C. § 1985(2) (1988) 19

MISCELLANEOUS:

Fed. R. Civ. P. 56 ..... 5, 14, 19

No. 94-836

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

ALBERT ALEXANDER, M.D.,
Petitioner,

v.

SAM PATTERSON, M.D., and STATE VOLUNTEER MUTUAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT STATE VOLUNTEER MUTUAL INSURANCE CORPORATION IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

State Volunteer Mutual Insurance Corporation ("SVMIC") prays that this Court deny the Petition for Writ of

Certiorari and decline to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Pursuant to Supreme Court Rules 15.2 and 24.2, SVMIC adopts Petitioner's citation to the opinions of the courts below.

JURISDICTION

Pursuant to Supreme Court Rules 15.2 and 24.2, SVMIC adopts Petitioner's statement as to this Court's jurisdiction.

STATEMENT OF THE CASE

Pursuant to this Honorable Court's Rules, *see* Sup. Ct. R. 15.1 ("Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later"), 24.2 ("no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side"), and in light of the nature of Petitioner's Statement of the Case, Respondent State Volunteer Mutual Insurance Company is compelled to restate the facts of this case including the decisions below. As Petitioner has abandoned all but his claim under Section 1985(2), this brief will address that claim only.

Petitioner, Dr. Albert Alexander, is a physician specializing in obstetrics and gynecology (hereafter "OB-GYN") who has testified and continues to testify as a paid expert witness in medical malpractice cases.

Respondent, Dr. Sam Patterson, is a physician specializing in OB-GYN. Dr. Patterson also serves as a member of a claims review committee of Respondent, State Volunteer Mutual Insurance Company. Dr. Patterson and Dr. Alexander attended medical school together and remained close friends for many years thereafter.

Respondent, SVMIC is an insurer that provides professional liability coverage for physicians practicing in Tennessee, including Petitioner, Dr. Alexander, and Respondent, Dr. Patterson.

Petitioner, Dr. Alexander, originally brought this lawsuit against five fellow physicians, the medical college from which he graduated (and on whose faculty he serves), the hospital where he practices, and his medical malpractice insurance carrier alleging a conspiracy to prevent him from testifying as an expert in medical malpractice actions or to punish him therefor. He also made claims for violations of anti-trust laws, slander, intentional infliction of emotional distress, unfair competition, and tortious interference with business relations. As the litigation progressed, many of the named parties were dismissed, and the action was limited by the district court to civil rights claims and supplemental state tort claims. After pleading and discovery, all defendants were dismissed except Respondents SVMIC and Dr. Sam

Patterson. Petitioner has now abandoned all claims except Section 1985(2).

The basis of Petitioner's claim under Section 1985(2) assertedly arises from the independent actions of Dr. Patterson as a physician and a member of the SVMIC claims review committee.

When Dr. Patterson heard rumors that Dr. Alexander had offered questionable testimony as a plaintiff's expert, Dr. Patterson, acting on his own, sought information about cases in which Dr. Alexander had testified. Acting out of concern for Dr. Alexander who was his colleague and friend, Dr. Patterson confirmed the rumors that Dr. Alexander had testified as to medical procedures about which he had no experience. Dr. Patterson wrote to Dr. Alexander imploring him to reconsider what he was doing and "testify about things truthfully and in the areas of his experience." (Docket Entry No. 63D; Deposition of Dr. Patterson at 279.) Subsequently, at Dr. Alexander's request, Dr. Patterson and two other physician friends met with Dr. Alexander to review his expert witness files and afterwards to dissuade him from testifying as an expert in areas where he had no expertise and from offering untrue testimony in areas where he was qualified. This effort bore no fruit, and the relationship between Drs. Alexander and Patterson and the other physicians began to deteriorate. Dr. Alexander continued to testify as to matters outside his expertise.

Sometime later, after he became Director of University of Tennessee Residents at Baptist Hospital East, Dr. Patterson was approached by Dr. George Ryan

concerning Alexander's performance as a member of the University faculty. Dr. Ryan had received several complaints from the residents who had objected to working with Dr. Alexander for reasons ranging from unprofessional behavior to the use of profanity. (Docket Entry No. 73B; Deposition of Dr. Ryan at 64-71.) Dr. Ryan was considering removing Dr. Alexander from the faculty but was persuaded not to do so by Dr. Patterson who vouched for Dr. Alexander's competence. In fact, Dr. Alexander remains on the faculty today. The relationship between Drs. Alexander and Patterson continued to sour, until ultimately this lawsuit ensued.

After substantial discovery, the district court granted Respondent's motion for summary judgment and determined that Petitioner's civil rights claims failed to meet the standard under Fed. R. Civ. P. 56, as construed by this Court. The district court found that Dr. Alexander failed to establish any proof in support of his allegations that Dr. Patterson and SVMIC had taken action to deter him from testifying as an expert in medical malpractice proceedings. In fact, there is no evidence in the record that SVMIC encouraged or even knew about any of Dr. Patterson's inquiries into Dr. Alexander's activities or participated in those inquiries. (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31.) The state claims were dismissed under the *Gibbs* Doctrine. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Petitioner's Statement of the Case contains misstatements of fact and misleading assertions as to the decisions of the courts below.

1.

Contrary to Petitioner's assertion, the district court did not "rule[] that Plaintiff had made out the necessary showing of a conspiracy," (Petition for Writ of Certiorari at 4), in its order granting summary judgment. Rather, the district court stated that Petitioner "had sufficiently *alleged* a conspiracy between the defendants," such that the claim under Section 1985(2) could survive a motion to dismiss for failure to state a claim upon which relief may be granted. *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 23.) On the motion for summary judgment, the district court, assuming a conspiracy *arguendo*, found Petitioner had not alleged "a sufficient nexus between the *alleged* conspiracy and an on-going federal proceeding, or that he has actually been deterred from testifying in federal court." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 25.) Contrary to Petitioner's assertion, a reading of the district court's opinion makes clear that the district court never determined as a factual matter that there was a conspiracy.

2.

In his petition Dr. Alexander refers to the term "hired gun" as used by Dr. Patterson, but never gives Dr. Patterson's definition of the term. Petitioner defines the term as "his [Dr. Patterson's] pejorative for plaintiffs' experts in medical malpractice cases." (Petition for Writ of Certiorari at 7.) The record of this cause reveals that Dr.

Patterson has explained the precise meaning of the term on several occasions as being an expert who will testify concerning subjects outside his expertise, (Docket Entry No. 63D; Deposition of Dr. Patterson at 248), or as an expert "who will testify that something's true that's not true, for money." (Docket Entry No. 63D; Deposition of Dr. Patterson at 68.)

3.

Petitioner asserts that because of Dr. Patterson's efforts to dissuade him from giving untrue testimony, the court of appeals "concludes that such actions cause Plaintiff [Dr. Alexander] to be damaged." (Petition for Writ of Certiorari at 6.) There is, in fact, no such conclusion by the court of appeals. Throughout the discovery and in all of the proceedings in this cause to date, Dr. Alexander has not identified any case in which he has not testified, or expert fee he has declined or lost because of the actions of Respondents. In his deposition, Dr. Alexander was repeatedly asked to identify any *fact* that supports his allegations that Respondents did anything to ostracize him or to bring economic or professional pressure to bear upon him for testifying as an expert in medical malpractice cases or to interfere wrongfully with his business. He was unable to point to one single fact in support of those allegations. Dr. Alexander, on the other hand, would not disclose his income from litigation activities so as to give the courts below a means by which to gauge whether he has or has not been adversely affected. (Docket Entry No. 63A, 63C, Deposition of Dr. Alexander at 91, 449.)

In his deposition, Dr. Alexander was repeatedly asked to identify any *fact* that supports his allegations that SVMIC did anything to ostracize him or to bring economic or professional pressure to bear upon him for testifying as an expert in medical malpractice cases or to interfere wrongfully with his business. He was unable to point to one single fact in support of those allegations against SVMIC. (Docket Entry No. 75; Deposition of Dr. Albert Alexander at 244-61.) A typical example of the dialogue is the following:

> Q: So your response then in your interrogatories that SVMIC approved that first interview is an assumption on your part based on the fact that Dr. Patterson was on the Claims Commission of SVMIC?
>
> A: Yes. He had been since 1983.
>
> Q: You are also saying in that interrogatory response that SVMIC approved Dr. Patterson's action to include Walter Ruch and then Louie Henry to review you [sic] records and testimony in April of 1986.
>
> What information do you have or what facts are you aware of that SVMIC approved the actions to which you refer?

A: Still an assumption that he is an agent of SVMIC and they would approve of all his actions.

Q: But nobody told you specifically that SVMIC asked Dr. Patterson, Dr. Henry, or Dr. Ruch to review your records, is that correct?

A: No, I mean that's correct.

Q: Now, you say that Dr. Patterson met with George Ryan, the same interrogatory response here, for the purpose of removing you from the teaching staff of the UT medical units, which would cause you to lose credibility as a witness, and you say that Dr. Patterson was SVMIC's agent when he met with Dr. George Ryan, was acting as SVMIC's agent. Do you have any *facts* to support that?

A: None other that he is on the Claims Adjustment Board.

Q: No one has told you Dr. Patterson was acting as a SVMIC agent in that regard, is that correct?

A: No, there doesn't seem to be any controversy that Dr. Patterson is on the Claims Adjustment Board.

Q: I understand that, but no one has told you that he was acting as SVMIC's agent when he met with Dr. Ryan, did they?

A: No.

Q: Has anyone ever told you that SVMIC has ever talked to anyone about limiting referrals from other physicians to you?

A: I don't recall.

Q: Are you aware of any *facts* that would support the allegation of this lawsuit that SVMIC in any way interfered or anyone acting on their behalf in any way interfered with referrals of patients by other physicians to you?

A: *I don't recall any facts.*

Q: Are you aware of any *facts* that would support your claim that SVMIC has ever interfered with existing business relationships you

have had in the practice of medicine?

A: *I don't have any facts.*

Q: Are you aware of any *facts* which would support your allegation that SVMIC has engaged in what might be considered false or misleading representations relative to your medical practice and your medical expert testimony?

A: *I don't have any facts* other than I consider Dr. Patterson is their agent and all of the facts that apply to him apply to them.

(Docket Entry No.75; Deposition of Dr. Albert Alexander at 409-15) (emphasis added).

On appeal, a panel of the United States Court of Appeals for the Sixth Circuit held that, "Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him." *Alexander v. Patterson*, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16.) But, in his Petition, Dr. Alexander also states that "the Sixth Circuit held that Plaintiff had shown that he was damaged." (Petition for Writ of Certiorari at 5.) In fact, the Sixth Circuit did not so hold. In his Petition, Dr. Alexander

states that "the Sixth Circuit *found* that Defendant and, 'others,' took actions which harmed the Plaintiff." (Petition for Writ of Certiorari at 6.) (emphasis added) (prior emphasis deleted). There is no such finding in the Sixth Circuit's opinion. The only possible excerpt upon which Petitioner may base such a conclusion is the following quotation from the "Background" section of the court's opinion:

> Alexander *claims* that this conduct has made him fearful when he testifies, prevented him from gaining membership in a health provider organization, caused him to lose physician referrals, and prompted his colleagues to shun him.

Alexander v. Patterson, 92-6424, slip op. at 2 (6th Cir. Aug. 10, 1994) (emphasis added) (Petition for Writ of Certiorari at 15.) A court's "finding" is distinct from a recitation of an allegation.

4.

In addition to the above, there is no evidence in this record that SVMIC encouraged or even knew about any of Dr. Patterson's inquiries into Dr. Alexander's activities or that SVMIC participated in those inquiries. (Docket Entry No. 84; Deposition of Patterson at 230-231). There is no evidence in the record that Dr. Patterson was asked to be a member of the Claims Review Committee because of Patterson's stand regarding the testimony by "hired guns" in medical malpractice cases.

Dr. Patterson admits that all his actions in this case relative to Dr. Alexander were his own and that SVMIC was completely unaware of those activities. (Docket Entry No. 84; Deposition of Patterson at 230-231, 248). The records of SVMIC support this lack of awareness or support for Patterson's activities. (Docket Entry No. 81; Deposition of Harold Burch at 51-53.)

Respondent respectfully submits that the foregoing discussion and clarification of the misstatements in the Petition demonstrate inaccuracies in the Petition sufficient to constitute ground for a Rule 14.5 denial of the Petition.

SUMMARY OF ARGUMENT

1. The Court of Appeals for the Sixth Circuit did not depart from the accepted and usual course of judicial proceedings so as to require this Honorable Court to exercise its power of supervision by holding that Petitioner's bare allegations did not establish the conspiracy necessary to state a claim under Section 1985(2). Petitioner failed to set forth facts to support the allegations in the pleadings that Respondents conspired to deprive Petitioner of his rights. To withstand a motion for summary judgment, the non-movant cannot rest on his pleadings.

2. The district court properly construed Section 1985(2) to require that Petitioner must show a nexus between the alleged conspiracy and the right sought

to be vindicated under the statute. The remedy provided under Section 1985(2) requires that Petitioner be denied or deterred from testifying either presently or in future cases, and he has failed to make that showing. In fact, Petitioner states that he continues to testify and intends to do so in the future.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

REASONS FOR DENYING THE PETITION

1. The unsupported allegations of Petitioner do not establish a genuine issue of material fact as to whether the Respondents conspired to deprive Petitioner of his rights under Section 1985(2) sufficient to withstand a motion for summary judgment; summary judgment was therefore properly granted and affirmed.

To withstand a motion for summary judgment, the non-movant (Alexander) who bears the burden of persuasion at trial cannot rest on the pleadings, but must go beyond the pleadings and "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (*quoting* Fed. R. Civ. P. 56). Although reasonable inferences are given to the

non-movant, *see Celotex*, 477 U.S. at 317, the party moving for summary judgment can prevail by pointing out to the court that "there is an absence of evidence to the support the non-moving party's case." *Celotex*, 477 U.S. at 324.

In the courts below, Dr. Alexander could not show the conspiracy necessary to support a Section 1985(2) claim, *Alexander v. Patterson,* No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16); nor was there evidence of any intimidation, threat or force used against him by Dr. Patterson or SVMIC. *Alexander v. Patterson,* No. 90-2474-G, slip op. at 10 (W.D. Tenn. Oct. 16, 1992) (Petition for Writ of Certiorari at 24-25.)

Conceptually, a civil conspiracy is illusive to define. The decisions agree, however, that to establish the claim, there must be some form of agreement between the actors. *Sampson v. Village Discount Outlet, Inc.,* 832 F. Supp. 1163, 1168 (N.D. Ill. 1993) ("An additional basis for denying [a plaintiff's] claim under § 1985(2) is his failure to demonstrate the existence of a conspiratorial agreement between the defendants."); *see also Bank v. DiMarco,* 836 F. Supp. 304 (E.D. Pa.), *aff'd,* 27 F.3d 556 (1993); *Myatt v. City of Chicago,* 816 F. Supp. 1259 (N.D. Ill. 1992); *McKenzie v. Doctor's Hospital of Hollywood, Inc.,* 765 F. Supp. 1504 (S.D. Fla. 1991); *Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.,* 775 F. Supp. 1420 (D. Kan. 1991). Because a conspiracy is an essential element of a claim under Section 1985(2), Petitioner bears the burden of persuasion at trial of establishing a conspiracy. Petitioner, however, failed to produce more than his bare allegations. As the court of appeals succinctly stated:

> The district court did not err in granting summary judgment against Alexander because Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Alexander v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16.) After months of discovery and countless depositions of various doctors allegedly involved in the conspiracy, Petitioner could muster nothing more to substantiate his claims than he could at the time of filing his original complaint. The record buttresses this. There is no evidence in the record that Dr. Patterson was asked to be a member of the claims review committee of SVMIC because of his concern about Dr. Alexander's questionable expert testimony. Furthermore, Dr. Patterson states that all of his actions in this case relative to Dr. Alexander were his own and motivated by feelings of personal concern and friendship toward Dr. Alexander and that SVMIC was completely unaware of those activities. (Docket Entry No. 84; Deposition of Dr. Sam Patterson at 230-31, 248.) Dr. Patterson was not acting on behalf of SVMIC during any of his conversations with Alexander or with others about Alexander, nor was SVMIC aware that the conversations took place.

Furthermore, Petitioner's own statements reveal the absence of any conspiracy including Dr. Patterson. When asked specifically on what facts he based the

allegation that Dr. Patterson devised a plan, Alexander responded as follows:

> He announced that - he stated that Dr. Ryan had called him in and asked him to remove me from the clinical faculty and that he said he didn't want to do that,...

(Docket Entry No. 75, Depo. of Albert Alexander at 114.)

With regard to Respondent, SVMIC, there has been no hint that anyone connected with SVMIC knew that Dr. Patterson planned to meet with Dr. Alexander for the purpose of dissuading him from giving untrue testimony. Throughout the depositions and discovery process, Petitioner has sought to link knowledge of the meeting with someone, anyone connected with SVMIC. This effort, however, has been to no avail, because no one at SVMIC knew of the meeting until the institution of this suit. Furthermore, with regard to the meeting of various doctors, nowhere in the transcript of that meeting does Dr. Patterson threaten Dr. Alexander or request that he cease testifying as an expert witness. Nor could Dr. Alexander show the conspiracy necessary to support the Section 1985(2) claim. Without a showing that the only other alleged conspirator had knowledge of the alieged overt act, there can be no conspiracy. To bridge this gap, Petitioner asserts that because Dr. Patterson was on the claims review committee, and that because SVMIC has a financial stake in the outcome of malpractice cases, ipso facto there is an agreement between the two parties to prevent Dr. Alexander from testifying as an expert.

Dealing specifically with civil conspiracy, the Tennessee Court of Appeals found in *Pusser v. Gordon,* 624 S.W.2d 639, 642 (Tenn. App. 1984), that competent proof cannot be drawn from an inference on an inference. *Id.* (citing *Umstattd v. Metropolitan Life Insurance Co.,* 21 Tenn. App. 312, 110 S.W.2d 243 (Tenn. App. 1937)); *see also Bowers v. Potts,* 617 S.W.2d 149 (Tenn. App. 1981).

A case should not be sent to a jury when there is only a mere scintilla of evidence to support a plaintiff's theory. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *see also Sadek v. Nashville Recycling Co.,* 751 S.W.2d 428 (Tenn. App. 1988). A plaintiff's verdict in a conspiracy case, furthermore, must not be based on inference, conjecture, or speculation, but must be based on substantial and material evidence. *Sampson v. Village Discount Outlet, Inc.,* 832 F. Supp. 1163, 1168 (N.D. Ill. 1993) ("Unsupported inferences and conclusions are insufficient to support a claim of conspiracy."); *see also Sadek,* 751 S.W.2d at 428; *Bowers v. Potts,* 617 S.W.2d 149 (Tenn. App. 1981).

The allegations of Petitioner, unsupported by facts, do not establish that there is a genuine issue as to whether Respondents, Dr. Patterson and SVMIC, conspired to deprive Petitioner of his rights under Section 1985(2). The record reflects in fact, precisely to the contrary, as the statement of the case above, points out.

2. The district court properly determined that Section 1985(2) requires a nexus between an alleged conspiracy and the right sought to be vindicated under the statute.

The Section 1985(2) claim for a deprivation of federally protected rights includes an action based on a conspiracy to deter the claimant from testifying freely, fully, and truthfully in an on-going federal proceeding. *See Kush v. Rutledge,* 460 U.S. 719 (1983). The other action available to Petitioner provides a remedy for a witness who is injured "in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2) (1988).

These so-called "witness intimidation" provisions protect against purely private conspiracies aimed at impeding the administration of justice in the federal courts. *See Kush v. Rutledge,* 460 U.S. at 424-26. The district court addressed the issue of whether Petitioner had established that he had suffered any harm "at any time since the *alleged* conspiracy began." *Alexander v. Patterson*, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (emphasis added) (Petition for Writ of Certiorari at 25). Without addressing whether Petitioner had met his burden under rule Fed. R. Civ. P. 56 for establishing a conspiracy, the district court reasoned as follows:

> Although Alexander alleges that Patterson and SVMIC conspired to prevent him from testifying for the plaintiff in

medical malpractice actions, in both federal and state court, plaintiff has not alleged that he has been in any way injured or deterred from testifying in any particular proceeding in federal court. In particular, plaintiff has not established or even alleged that he was actually hindered from testifying 'freely, fully and truthfully' at any time since the alleged conspiracy began, or that the alleged conspiracy has involved any federal proceeding.

Nor has plaintiff sufficiently alleged that defendants' conspiracy has resulted in any injury to him on account of his having 'attended or testified' in past cases in federal court. At his deposition, Alexander could not state the number of times he has testified in court or been deposed in medical malpractice cases and could not remember the specific number of times he has testified for or consulted with plaintiffs in such cases during the last year. He has not provided any evidence or support beyond his allegations that the has been hampered or deterred from testifying in malpractice cases in federal court, or that he has been retaliated against because of his testimony. Where the witness or party is not hampered or deterred from testifying in a federal proceeding, there is no deprivation of rights or injury as required by § 1985(2).

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992) (Petition for Writ of Certiorari at 25); *see also, e.g., Bretz v. Kelman,* 773 F.2d 1026 (9th Cir. 1985); *Brawer v. Horowitz,* 535 F.2d 830 (3d Cir. 1976). When the party alleges a deprivation under Section 1985, he must show an injury resulting therefrom. *See Rylewicz v. Beacon Services, Ltd.,* 888 F.2d 1175 (7th Cir. 1989). A direct injury from the alleged conspiracy is an essential element of proof for a Section 1985(2) violation. *See Koehler v. Cummings,* 380 F. Supp. 1294 (W.D. Tenn. 1971). And without an injury resulting in damage, an action for civil conspiracy cannot be established. *See id.*

Despite the findings of the district court and the proof in the record, including Petitioner's own admissions, he insists that this Court should review his claim because, as Petitioner states:

> The Opinion recites that:
>
> > "...[H]e,{Defendant Patterson}[sic] and others, confronted Alexander and tried to dissuade him from testifying in future cases[.]" and [sic] concludes that such actions caused Plaintiff to be damaged.

(Petition for Writ of Certiorari at 6.) Despite the thinly veiled attempt to attribute a conclusion to the court of appeals which it clearly did not reach, Petitioner misses the point. The district court determined that there was no nexus between the alleged conspiracy and either present or future testimony in federal trials. Petitioner's blanket allegation of "damage" sounds in tort which is where this

claim would be heard, if at all. *See Griffin v. Breckenridge,* 403 U.S. 88 (1971) ("That the statute [§ 1985(3)] was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."); *see also Kimble v. D.J. McDuffy, Inc.,* 648 F.2d 340, 348 (5th Cir. 1981). The district court stated that:

> To establish a claim under the first part of § 1985(2), the plaintiff must show (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. The intent of §1985(2) is to prevent conspiracies "the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States." The statute is concerned with conspiracies involving perjury, subornation of perjury, or criminal obstruction of justice. An action under §1985(2) must therefore involve the intimidation of witnesses, parties or court officers in an ongoing federal proceeding, and there must be a connection between the conspiracy and the witness, party, or juror. There can be no violation of §1985(2) unless the plaintiff establishes a nexus between an alleged conspiracy and a federal court proceeding.

Alexander v. Patterson, No. 90-2474-G, slip op. at 7 (W.D. Tenn. Oct. 16, 1992)(citations omitted)(footnote omitted)(Petition for Writ of Certiorari at 25); *see also David v. United States*, 820 F.2d 1038 (9th Cir. 1987); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985); *Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984). Although the district court did not reach the question of whether Petitioner had established a conspiracy, the court was justified in dismissing Petitioner's claim on the ground that he had not alleged a nexus between the alleged conspiracy and the harm sought to be remedied under Section 1985(2).

The district court correctly found that Petitioner had failed to establish any genuine issue of material fact sufficient to overcome the pending motions for summary judgment. Because Petitioner failed to identify a genuine issue of material fact upon which liability could be found on the part of Dr. Sam Patterson and SVMIC, the district court properly granted the motion for summary judgment. The district court was presented with substantial testimony which undermined Dr. Alexander's conclusions and allegations. In viewing the proof presented by Dr. Alexander, the district court found a string of vague conclusions and unrelated events which, Dr. Alexander claims, formed some elaborate "plan" to discredit him, spear-headed by Dr. Patterson. *See Sampson*, 832 F. Supp. at 1168 ("[A plaintiff] is required to show that there was 'a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences.'") (*quoting Lenard v. Argento*, 699 F.2d 874, 883 (7th Cir. 1983)). Petitioner's proof, however, consists of conjecture, speculation and

inference. The facts presented to the trial court by deposition testimony do not support the inferences drawn by Dr. Alexander. As Dr. Patterson stated:

> Well, I wasn't doing it [investigating] representing the insurance company. Albert was just my good friend about whom there was bad gossip going on and I didn't believe it was really true and I wanted to find out if that's what really what was going on.

(Docket Entry No. 63D; Deposition of Dr. Patterson at 231.) When asked if he was keeping anyone appraised of his progress in trying to dissuade Dr. Alexander from giving untrue testimony, Dr. Patterson stated:

> Well, there wasn't any progress. I just made these three or four phone calls one morning. That was it. There wasn't anybody to appraise of the progress.

(Docket Entry No. 63D; Deposition of Dr. Patterson at 234.) There was no proof available to the district court that anyone acted with Dr. Patterson to deter Dr. Alexander by force, threats, or intimidation. The word "force", in fact, does not appear in Dr. Alexander's deposition testimony.

There is no proof in the record to indicate that Dr. Alexander has suffered any injury or damage resulting from an alleged conspiracy to intimidate him as a witness. He continued and continues to testify. There is, furthermore, no proof in the record that because of

Respondents' alleged acts, Dr. Alexander has failed to review a case, or to testify either by deposition or in court. There is absolutely no proof whatever that Dr. Patterson or SVMIC has prevented or attempted to prevent Dr. Alexander from accepting any expert witness arrangement by the means required for a Section 1985(2) violation.

3. The record clearly supports the basis upon which the Court of Appeals affirmed the district court's decision.

Although the Court of Appeals for the Sixth Circuit did not question the determination of the district court, it decided the case on grounds other than those relied upon by the district court. *See Anderson v. Patterson,* No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 14). After reviewing the record and briefs of the parties, the court of appeals held that the mere fact that:

> Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

Anderson v. Patterson, No. 92-6424, slip op. at 3 (6th Cir. Aug. 10, 1994) (Petition for Writ of Certiorari at 16).

Courts of appeal may affirm the decisions of lower courts on other grounds provided the ground appears

clearly in the record. *See Brown v. Saint Louis Fire Dep't,* 691 F.2d 393 (8th Cir.), *cert. denied,* 461 U.S. 908 (1983); *Mason v. Clark,* 920 F.2d 493, 495 (8th Cir. 1990).

The record in these proceedings clearly indicates that Respondents are entitled to a summary judgment on the basis of Petitioner's failure to establish the facts necessary to show a conspiracy between Dr. Patterson and SVMIC, and for the failure of Petitioner to allege that he has been injured as a direct result of the alleged conspiracy. The Court of Appeals for the Sixth Circuit held that Petitioner failed to establish sufficient facts raising a material fact as to whether there was a conspiracy, and the record wholly supports that determination. Courts of appeal are not limited to review of determinations that are raised. In light of this, it was not error for the court of appeals to affirm the decision of the trial court on grounds other than those that it relied upon.

CONCLUSION

It was not error for the Court of Appeals for the Sixth Circuit to affirm the decision of the district court on the ground that Petitioner had not met his burden of establishing a conspiracy. Petitioner has not, furthermore, established that any of the proceedings below are a departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervision.

Petitioner has in fact presented inaccuracies and misstatements in his Petition in an effort to invoke this Honorable Court's power to review the case.

In light of this, Respondent SVMIC respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

Leo M. Bearman
Attorney of Record for
Respondent State Volunteer
Mutual Insurance Company

BAKER, DONELSON,
BEARMAN & CALDWELL
2000 First Tennessee Bldg.
Memphis, TN 38103
(901) 526-2000